IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NORRIS E. SMITH, SR., ET AL.	*	
	*	
v.	*	Civil No. JFM-03-139
	*	
EQUILON ENTERPRISES, LLC	*	

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MEMORANDUM

Plaintiffs, General Transportation Exchange, Inc, ("GTX"), and its owner, Norris E. Smith, Sr., have instituted this action against Equilon Enterprises, LLC. Discovery has been completed, and defendant has moved for summary judgment. Plaintiffs' claims are entirely without merit and do not warrant extended discussion. Therefore, I will merely state briefly the reasons I am granting summary judgment in favor of defendant.

1. To the extent that plaintiffs seek to recover damages at either lost profits at the Waldorf site or the Indian Head site based upon an alleged agreement by defendant to lend money to open an Xpress Lube facility in Waldorf, their claim is barred by the statute of frauds. Plaintiffs admit that the alleged contract relating to the Waldorf site could not be performed within one year and is therefore subject to the statute of frauds. Maryland Code Ann., Cts. & Jud. Proc. §5-901. The writing upon which plaintiff relies to satisfy the statute of frauds (guaranties executed by plaintiff Smith and his wife) were not signed by defendant and therefore do not take the writing outside of the statute under the "unless" clause of §5-901. The guaranties also do not set forth the alleged contract's terms and conditions or describe the subject matter of the contract as required to satisfy the statute. *See, e.g., Friedman & Fuller, P.C. v. Funkhouser*, 107 Md.App. 91, 105, 666 A.2d 1298, 1305 (1995). Moreover, the guaranties were signed on December 4, 1998, and obviously related to the proposed Indian Head facility, not the proposed

Waldorf facility that plaintiffs allege was first contemplated in the latter part of 1999.

2. Although Maryland law arguably does not establish a *per se* prohibition against start-up businesses from recovering lost profits, *see Edwards Family Ltd. P'ship v. Barlow*, 915 F.2d 1564, 1990 U.S. App. LEXIS 18153, at *23 (4th Cir. 1990) (unpublished), Maryland law is absolutely clear that lost profits must be proven with reasonable certainty. Here, even assuming that the expert opinion of Mr. Drummond is admissible (which, as I will state in a moment, it is not), any finding that plaintiffs suffered lost profits at either site would be entirely speculative in light of (1) the evidence that Smith, the principal of GTX, was a retired WMATA employee whose only prior business involvement had been a small candy company in the 1970s that, as Smith admitted, "made a penny more than it cost;" (2) the evidence that the Indian Head site turned out to be entirely unsuitable for an Xpress Lube facility because of its high water level; and (3) the absence of any evidence whatsoever that any comparable facility in Indian Head or Waldorf (or areas in reasonable proximity to them) had earned profits during any relevant time frame.

3. Mr. Drummond's testimony does not meet *Daubert* standards and therefore is inadmissible. His methodology and ultimate opinion are fundamentally flawed because, as he has admitted, he assumed to be true the very fact his expert opinion is necessary to establish: that GSX's start-up businesses would have been profitable. Instead of engaging in the analysis that utilization of his expertise would have required, he simply made mathematical calculations on the basis of *pro forma* statements which, by definition, are hypothetical.

4. Insofar as plaintiffs seek damages for losses allegedly suffered at other businesses GTX did operate at the Indian River site as a result of defendant's failure to fund the Xpress

Lube project at the Waldorf site, the claim fails because, as stated in paragraph 1 above, there was no enforceable agreement between the parties requiring defendant to fund an Xpress Lube facility at the Waldorf site. Moreover, even if there were such an enforceable agreement, (1) the damages claimed by plaintiffs at the Indian Head site were not a reasonably foreseeable consequence of the failure to provide funding for the Waldorf site project, and (2) plaintiffs have pointed to no evidence in the record that would meet their burden of proving any causal connection between the failure to fund the Waldorf facility and the losses suffered at Indian Head.

5. Smith has no standing to assert any of the claims asserted by plaintiffs in this action. The alleged contract was between defendant and GTX and it was GTX that allegedly suffered the damages that plaintiffs claim.

6. The interplay between Maryland Commercial Law Code Ann. §3-303, requiring a plaintiff to choose between suing on a dishonored instrument or on the underlying contract of sale, and Fed. R. Civ. P. 8(a), permitting demands for alternative remedies, presents a somewhat interesting question. However, the question is entirely academic in this case because any obligation on the part of defendant to honor the check issued in connection with the proposed project at the Waldorf site arose from the alleged agreement between the parties: an agreement which, as stated above, is entirely unenforceable.

A separate order granting defendant's motion for summary judgment and to exclude expert testimony is being entered herewith.

Date: June 29, 2004

/s/
J. Frederick Motz
United States District Judge

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ORDER

For the reasons stated in the accompanying memorandum, it is, this 29th day of June 2004

ORDERED

1. Defendant's motion for summary judgment is granted; and

2. Judgment is entered in favor of defendant against plaintiffs.

/s/
J. Frederick Motz
United States District Judge